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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

RANDALL BOERSIG,
Petitioner,

v.

UNION ELECTRIC COMPANY;
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL 1439,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether hiring preferences which have nothing to do with length of service, and which can exist separate and apart from a length of service rule, can nevertheless be deemed part of a seniority system merely because they operate in connection with a length of service rule to determine entitlement to jobs?

2. Whether Congress wanted seniority systems which deny job opportunities to disabled people without any business necessity to be immune from challenge under the disparate impact provisions of the Americans with Disabilities Act?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	1
Statute Involved	1
Statement of the Case	1
Reasons for Granting the Petition for Certiorari	3
Conclusion	15
Appendix:	
Opinion of the United States Court of Appeals for the Eighth Circuit dated July 6, 2000	A-1
Order of the United States Court of Appeals for the Eighth Circuit dated August 22, 2000	A-12

TABLE OF AUTHORITIES

Cases: Page:

Blake v. Los Angeles, 595 F.2d 1367 (9th Cir. 1979) 11

California Brewers Ass'n v. Bryant, 100 S.Ct. 814 (1980) 4-7, 15

Craig v. Ala. State Univ., 804 F.2d 682 (11th Cir. 1986) 6

Dir., Office of Workers' Comp. v. Newport News, 115 S.Ct. 1278 (1995) 8

Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) 12

Hameed v. Intern. Ass'n.. 637 F.2d 506 (8th Cir. 1980) 11

Indianapolis Life Ins. Co. v. U.S., 115 F.3d 430 (7th Cir. 1997) 8

Statutes:

Age Discrimination in Employment Act 8-9

Americans with Disabilities Act ..... passim

Rehabilitation Act 8-9

Title VII of the Civil Rights Act of 1964 8-12

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, handed down on July 6, 2000, is officially reported at 219 F.3d 816 (8th Cir. 2000). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on July 6, 2000. Plaintiff Boersig filed a petition for rehearing en banc which was denied on August 22, 2000. The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

The Americans with Disabilities Act forbids employers from using "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless [they are] shown to be job-related for the position in question and are consistent with business necessity." 42 U.S.C. §12112(b)(6).

STATEMENT OF THE CASE

For more than ten years, Plaintiff Boersig has been mired in the entry level position of Meter Helper in Defendant Union Electric's Meter Division. He cannot move up to the next highest position of Meter Installer because UE contends he cannot perform this job in light of his physical disability. He cannot move up to the next highest position of Meter Repairman — the job at issue here — because UE and the Defendant Union have adopted a policy in the collective bargaining contract

which requires that Installers be offered Repairman openings before they are offered to Helpers. The practical effect of this policy is to freeze Mr. Boersig into the low-paying position of Meter Helper and to deny him advancement to the higher-paying position of Meter Repairman, even though nobody contends he cannot perform the Repairman job. Mr. Boersig maintains that Defendants should waive their policy as applied to him and allow him to promote directly from Helper to Repairman.

Mr. Boersig brought this lawsuit alleging, among other things, that Defendant's policy violates the disparate impact provisions of the ADA. Central to disparate impact analysis is the idea that people with disabilities should not be denied employment opportunities because of selection criteria which, while not intended to discriminate against them, have the effect of discriminating against them without any business necessity. 42 U.S.C. 12112(b)(6). To assert a successful disparate impact claim, Mr. Boersig must show that the challenged selection criterion has an adverse effect on him because of his disability. If he makes such a showing, the burden of proof shifts to Defendants to show that the selection criterion is job-related and consistent with business necessity — that it bears a clear and demonstrable relationship to successful performance of the Repairman job. 29 C.F.R. 1630.10 (Appendix).

It is undeniable that Defendants' policy favoring Installers over Helpers for the Repairman job has an adverse effect on Mr. Boersig because of his disability. The only reason he was refused promotion to Repairman in 1996 was because he was not an Installer and the only reason he was not an Installer was because of his

disability. The policy keeps Mr. Boersig stuck in the Helper job with no realistic prospect of ever moving up to the Repairman job. Furthermore, it is undeniable that Defendants offered no evidence to show that this adverse effect on Mr. Boersig is justified by any business necessity. Indeed, the only evidence in the record establishes that prior experience as an Installer is *not* necessary to do the work of a Repairman. Under these circumstances, Mr. Boersig has a valid disparate impact claim.[1]

Nevertheless, the Eighth Circuit affirmed the dismissal on summary judgment of Mr. Boersig's disparate impact claim on the grounds that (1) Mr. Boersig is challenging a seniority system in a labor contract and (2) a seniority system in a labor contract is immune from disparate impact analysis under the ADA. Plaintiff Boersig submits that a U.S. Supreme Court case makes it clear that he is not challenging a seniority system and that, even if he is, Congress did not intend to exempt seniority systems from disparate impact analysis. Because the Eighth Circuit's ruling contradicts a U.S. Supreme Court case, and will harm many disabled employees who Congress wanted to help, corrective review is warranted.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

A.

Promotion to Repairman in UE's Meter Division is determined by two considerations in the collective bar-

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[1] If experience as an Installer were really necessary to be a Repairman, UE would *require* it as an essential prerequisite for the job. Notably, however, it does not.

gaining contract. First, Installers must be offered the job ahead of Helpers. Second, the employee with the most seniority in the Division must be selected for it. Although the second consideration may be a seniority rule, Mr. Boersig is not challenging it in this case. He was not denied the job of Repairman in 1996 because he had less divisional seniority than Gina Perry, the person who got the job instead of him. On the contrary, he had *more* divisional seniority than she did. Indeed, he outranked her in seniority by more than 60 months. Rather, Mr. Boersig was denied the Repairman position because, unlike Ms. Perry, he was not an Installer. That was the sole reason. He did not get the job because of the first consideration in the labor contract, the one that gives preference to Installers over Helpers when Repairman vacancies are filled. This consideration has nothing to do with length of service and cannot be characterized as a seniority rule.[2]

Nevertheless, the Eighth Circuit held, without any analysis or discussion, that Mr. Boersig is challenging a seniority system in this case. Apparently the Court believed that the hiring preference given to Installers is part of a "seniority system" because it operates in connection with a seniority rule to determine promotions to the Repairman job. But this conclusion clashes with the U.S. Supreme Court's decision in *California Brewers Ass'n v. Bryant*, 100 S.Ct. 814 (1980), a case the

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[2] Mr. Boersig can hardly be said to be challenging a seniority rule when he had the most seniority of anyone who expressed an interest in the Repairman position. Ironically, it was *his* seniority rights that were infringed when Ms. Perry was awarded the job in 1996, since he had more seniority than she did. Giving Mr. Boersig the Repairman job in 1996 would not have infringed anyone's seniority rights, least of all Ms. Perry's.

Eighth Circuit did not cite in its opinion, even though the parties discussed it at length in their appellate briefs and at oral argument.

California Brewers stands for the basic proposition that hiring preferences which have nothing to do with length of service, and which can exist independently of a length of service rule, do not become ancillary parts of a seniority system just because they are linked and connected to a length of service rule. Concrete examples, drawn from the Court's opinion, clarify the point. Suppose an employer prefers to promote the tallest employees with the most seniority, or the strongest employees with the most seniority, or the best educated employees with the most seniority. 108 S.Ct. at 819 n.13, 821. None of these hiring preferences are ancillary parts of a seniority system, and thus immune from disparate impact analysis, for two reasons.

First, hiring preferences based on height, strength or education do not conform to the core concept of seniority since they do not focus on length of employment. 100 S.Ct. at 819, 821. Second, they can and often do exist independently of any length of service provision and thus "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system." 100 S.Ct. at 821. In this respect, they are unlike the examples of ancillary rules given by the Court in *California Brewers* which define when or how seniority accrues or is forfeited. Such rules do not have any life of their own separate and apart from a length of service provision. 100 S.Ct. at 820-821.

This mode of analysis is dictated by important policy considerations. Congress wanted to protect members of protected groups from eligibility criteria that have an

adverse effect on their employment opportunities without any compelling business necessity. If hiring preferences which have nothing to do with length of service, and which can exist independently of a length of service rule, could be deemed part of a seniority system simply because they are joined to a length of service rule the protection afforded employees would be severely eroded and undermined. A whole host of hiring preferences otherwise unlawful under the disparate impact provisions of the anti-discrimination laws would suddenly become lawful. For example, suppose an employer has a height or strength standard that keeps women or disabled people from moving up to a job they can clearly perform. Promoting the tallest or strongest employees would be unlawful, but promoting the tallest or strongest employees with the most seniority would be lawful. Anomalous results like these would subvert and thwart a key purpose of the disparate impact provisions of the anti-discrimination laws. That is why the Supreme Court warned against an overly expansive interpretation of the term seniority system in *California Brewers*. 100 S.Ct. 820-821.

Applying these principles to this case shows that Defendants' selection criterion is not an ancillary part of a seniority system. It is a hiring preference based on prior experience in a particular job classification; it gives employees with experience as Installers priority consideration for the Repairman position. This kind of hiring preference has nothing to do with length of service and can, and often does, exist separate and apart from a length of service rule. It can be challenged under a disparate impact theory, *see, e.g., Craig v. Ala. State Univ.*, 804 F.2d 682, 689-691 (11th Cir. 1986), and does not suddenly become immune from challenge just be-

cause a seniority rule is engrafted on it. The Eighth Circuit's opposite holding contradicts the U.S. Supreme Court's decision in *California Brewers* and should not be allowed to stand.[3]

B.

After holding that Mr. Boersig is challenging a seniority system, the Eighth Circuit went on to hold that seniority systems are immune from challenge under the disparate impact provisions of the ADA. According to the Court, a seniority system does not fit the definition of "selection criteria" in the statute. But the Eighth Circuit did not analyze the text and history of the ADA and therefore overlooked important considerations which are necessary to understand the intent and will of Congress.

The meaning of the term selection criterion, although not defined in the ADA, is not difficult to understand. It is anything an employer uses to select an employee for a job or other employment benefit. A seniority rule easily satisfies this definition. Congress could have decided, if it wished, to exempt seniority rules from the scope of the term selection criterion. Significantly, it did not. Instead, it elected to broadly forbid all selection criteria, without qualification or exception, that have an unjustified disparate impact on people with disabilities. 42 U.S.C.12112(b)(6). As the EEOC has emphasized, "all types of selection criteria" are subject to disparate impact analysis under the ADA. 29 C.F.R.1630.10

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[3] U.S. Supreme Court cases are not self-enforcing. Lower courts which distinguish them to death or, as here, ignore them altogether, do a disservice to them, blocking their implementation in cases where they should apply.

(Appendix). The Eighth Circuit was not at liberty to rewrite the ADA to create an exemption that Congress did not see fit to create. "What Congress might have done, it did not do; only what Congress actually enacted is the law." *Indianapolis Life Ins. Co. v. U.S.*, 115 F.3d 430, 434 (7th Cir. 1997).

Any doubt about the matter is dispelled by the history of the ADA in relation to other federal anti-discrimination statutes. It is crucial to understand that Congress exempted seniority systems from disparate impact analysis in Title VII and the ADEA, see 42 U.S.C. 2000e-2(h) and 29 U.S.C. 623(f)(2), but did *not* exempt them from disparate impact analysis in the ADA and the Rehabilitation Act, the two disability discrimination statutes. Indeed, Congress incorporated several provisions of Title VII into the ADA and the Rehabilitation Act, *see* 42 U.S.C. 12117(a) and 29 U.S.C. 794a(a)(1), but conspicuously declined to incorporate the provision that exempts seniority systems from disparate impact analysis. Can a court assume that Congress would have included the exemption in the ADA and the Rehabilitation Act if it had thought about it? That it did not include the exemption out of inadvertence or forgetfulness? Or must a court assume that the silence Congress exhibited in the ADA and the Rehabilitation Act is significant when compared to the speaking up it did in Title VII and the ADEA? That it must have intended to subject seniority systems to disparate impact analysis in the two disability discrimination statutes? The answers can be found in cases such as *Dir., Office of Workers' Comp. v. Newport News,* 115 S.Ct. 1278 (1995).

In *Newport News*, the Director of the Office of Workers' Compensation Programs in the Department of Labor argued that she had standing to appeal a denial of

benefits to an employee under the Longshore and Harbor Workers' Compensation Act (LHWCA). Although the LHWCA did not expressly give the Director standing to appeal a benefits denial, a similar statute, the Black Lung Benefits Act (BLBA), expressly did. The Director argued that since Congress gave her standing to appeal under the BLBA, it must have meant to give her standing to appeal under the LHWCA as well. Justice Scalia, writing for the Court, stated:

> This is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: When, in a legislative scheme of this sort, Congress wants the Director to have standing, it says so. . . The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.

115 S.Ct. at 1288. The same reasoning applies with equal force here. Congress knew how, when it wished, to exempt seniority systems from disparate impact analysis. That it did so in Title VII and the ADEA, but not in the ADA and the Rehabilitation Act, shows that it intended to allow people with disabilities to challenge any seniority system that has an unjustified adverse impact on them.

The Eighth Circuit's concern that seniority systems in labor contracts would be unduly disrupted if they could be challenged under a disparate impact theory is unfounded for two reasons. First, if this was really a problem, Congress would have exempted seniority systems from disparate impact analysis when it enacted the ADA. It did not. Second, it is hard to see how a true seniority rule, one that focuses on length of employ-

ment, could ever have an adverse impact on an employee *because of his disability*. Consider the typical fact pattern in the cases cited by Defendants. The plaintiff develops a physical disability which makes it impossible for him to perform his current job. He asks his employer to accommodate his disability by transferring him to a vacant job that he can perform. The employer refuses, pointing out that another employee with more years of service is entitled to the vacant job under the seniority rules of the collective bargaining agreement. The reason the plaintiff does not get the job is because of his lack of sufficient seniority and his lack of sufficient seniority is not a function of his disability. Accordingly, the seniority rules do not have any adverse impact on him because of his disability. Cases in which a disabled employee could mount a successful challenge to a true seniority rule are exceedingly rare — and probably non-existent. Under these circumstances, the Eighth Circuit's concern about undue disruption of seniority systems is mysterious. It is a not a concern that is grounded in any practical reality.

To be sure, the Eighth Circuit had a broader concern. Its opinion plays heavily on the theme that members of protected groups should not be allowed to invalidate the terms and provisions of collective bargaining contracts under a disparate impact analysis because it would defeat the legitimate rights and expectations of other employees under those contracts. But this kind of reasoning proves too much. Taken seriously, it would immunize *all* selection criteria in labor agreements from disparate impact analysis under Title VII and the ADA because *all* such criteria create rights and expectations in other employees. What is important to understand is that these rights and expectations are not

necessarily *legitimate* ones. Selection criteria which have a disparate impact on women, blacks or disabled people without any business necessity are unlawful and, as such, cannot create any legitimate rights in the men, whites or able-bodied employees who benefit from them. If they did, no member of a protected group could ever assert a successful disparate impact claim under the anti-discrimination laws. That cannot be right.

To see this, suppose a labor contract contains a height requirement that has an unjustified disparate impact on women, *see Blake v. Los Angeles,* 595 F.2d 1367 (9th Cir. 1979), or a high school diploma requirement that has an unjustified disparate impact on blacks. *Hameed v. Intern. Ass'n.,* 637 F.2d 506 (8th Cir. 1980). Nobody could responsibly contend that such contractual provisions are immune from legal challenge because there are male employees and white employees who benefit from them and would cease to benefit from them if they were invalidated. These employees are benefitting from the unlawful nature of the labor contract and thus have no legitimate rights in it.

The Eighth Circuit's reasoning makes sense only if Congress meant to exempt all selection criteria in collective bargaining contracts from disparate impact analysis under Title VII and the ADA. But it had no such intent. Selection criteria that are unlawful under a disparate impact analysis do not become lawful merely because they are inserted in a labor contract. The U.S. Supreme Court made this clear under Title VII in *California Brewers.* But it is equally clear under the ADA. The statute is broadly written to apply to all selection criteria and does not carve out any exceptions for selection criteria contained in labor contracts. Indeed, the House of Representatives Report expressly

states that "an employer cannot use a collective bargaining agreement to accomplish what it would otherwise be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals and were not job-related and consistent with business necessity could be challenged under this Act." H.R. Rep. at 63 quoted in *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1049 (7th Cir. 1996). The Eighth Circuit's decision threatens to eviscerate the disparate impact provisions of Title VII and the ADA as applied to union employees, leaving them without the protection afforded other employees in the workplace. Such a result runs counter to the intent of Congress.

The Eighth Circuit relied on reasonable accommodation cases in ruling against Mr. Boersig. But he is not asserting a reasonable accommodation claim; he is asserting a disparate impact claim. There is a material difference between the two kinds of claims which the Eighth Circuit failed to appreciate.

At stake in these cases are the interests of the disabled employee on the one hand, and the interests of the employer and other non-disabled employees on the other. In a reasonable accommodation case, the plaintiff is not arguing that the challenged selection criterion is unjustified by business necessity. As a result, the balance of competing interests weighs against the disabled employee and in favor of the employer and other non-disabled employees. This case illustrates the point. Suppose that, contrary to what the record shows, prior experience as an Installer is necessary to do the work of a Repairman so that Defendants' policy of favoring Installers over Helpers for the Repairman position is

justified by business necessity. Then Mr. Boersig's claim to the Repairman job would be extremely weak. He would lack the experience as an Installer that is necessary to perform the duties of a Repairman. UE's interest in enforcing its policy would be strong, since it needs to hire Repairmen who can do the job. And non-disabled employees like Gina Perry would have a legitimate expectation that they would be selected for Repairman openings because, by virtue of their experience as Installers, they would be uniquely qualified for them.

Everything changes, however, in a disparate impact case. Unlike the plaintiff in a reasonable accommodation case, the plaintiff in a disparate impact case is arguing that the challenged selection criterion is unjustified by business necessity. As a result, the balance of competing interests swings in favor of the disabled employee and against the employer and other non-disabled employees. Again, this case illustrates the point. Suppose that, as the record shows, prior experience as an Installer is not necessary to do the work of a Repairman so that Defendants' policy of favoring Installers over Helpers for the Repairman position is unjustified by business necessity. Then Mr. Boersig's claim to the Repairman job becomes extremely strong. His lack of experience as an Installer does not matter because experience as an Installer is not necessary to perform the duties of a Repairman. He can do the job. UE's interest in enforcing its policy is sharply diminished, since both Helpers and Installers are capable of performing the Repairman job. It has no compelling need to accord a preference to Installers. And non-disabled employees like Gina Perry do not have any legitimate expectation that, because they have experience as Installers, they should be awarded the Repair-

man job. That experience does not make them uniquely qualified for the job. Helpers like Mr. Boersig are also qualified for the Repairman job — without any experience as Installers.

In short, Mr. Boersig was denied promotion to Repairman on account of his disability *for no good reason.* At least not a reason deemed sufficient by Congress. And that is the essential point. In cases where, as here, an employee with a disability is denied a job because of a selection criterion which has not been shown to be job-related and consistent with business necessity Congress has struck the balance of competing interests in favor of the employee — *not* the employer or other non-disabled employees. That legislative policy choice deserves the careful attention and deferential respect of courts. Because the Eighth Circuit's decision is unfaithful to the broadly remedial purposes of the disparate impact provisions of the ADA, it should be critically reexamined and set aside.[4]

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[4] Congress expressly found that persons with disabilities "continually encounter. . . exclusionary qualification standards and criteria" which relegate them to "lesser jobs" and enacted the ADA to combat this problem. 42 U.S.C. 12101(a)(5).

CONCLUSION

The legal question of what constitutes a "seniority system" is one of general importance which has previously attracted the attention of the U. S. Supreme Court. *California Brewers, supra.* The additional legal question of whether disparate impact may be a basis for challenging a seniority system under the ADA is also one of general importance, especially when the term "seniority system" is given the kind of broad definition the Eighth Circuit has given it. Either question by itself would be worthy of review by the U.S. Supreme Court. Taken together, they furnish a compelling basis for granting Mr. Boersig's petition for certiorari.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-2699

Randall Boersig,
Appellant,

Appeal from the United States

v.

Union Electric Company; International Brotherhood of Electrical Workers, Local 1439,
Appellees.

District Court for the Eastern District of Missouri.

Submitted: April 13, 2000 Filed:
Before BOWMAN, MAGILL, and HANSEN, Circuit Judges.

MAGILL, Circuit Judge.

Randall Boersig appeals from the district court's[1] grant of summary judgment in favor of Union Electric Company (Union Electric) and the International Brotherhood of Electrical Workers, Local 1439 (Local 1439), on his claims under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. For reasons to be discussed, we affirm.

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[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

I. BACKGROUND

A. Randall Boersig's Physical Disabilities and Related Work Restrictions

Boersig, a forty-three year old white male, began working for Union Electric in 1986 as an automotive mechanic helper. He remained in that position until approximately November 1989, at which time he joined Union Electric's Meter Testing and Installation Department (Meter Division) as a Meter and Installation Helper (Helper). The Helper job is an entry-level position, and Helpers are the lowest paid workers in the Meter Division. Understandably, after working for approximately one decade as a Helper, Boersig wanted to move into other higher paying positions within the Meter Division.

Since the mid-1980s, Boersig has been involved in a series of automobile and workplace accidents which have left him with physical impairments affecting both his knees, both his wrists, his right hip and his left shoulder. He has undergone multiple surgeries to these parts of his body. Boersig's physical impairments culminated in permanent medical restrictions forbidding the following conduct: 1) kneeling, 2) squatting, and 3) lifting over twenty-five pounds. In addition to these permanent medical restrictions, the record reveals that Boersig has claimed difficulty climbing ladders and handling tools. Notwithstanding these medical restrictions, Boersig is able to perform the Helper job functions with accommodations provided by Union Electric. He uses a stool or sits on the floor to avoid kneeling and squatting, and Union Electric reassigns tasks involving heavy lifting to Boersig's coworkers.

B. Union Electric's Promotional System

The Meter Division constitutes a promotional series with the following positions: 1) Meter Helper, 2) Meter Installer, 3) Meter Repairman, 4) Power Meterman, and 5) Meter Standards Tester. The promotional system at issue in this case is the product of a collective bargaining agreement (CBA) between Union Electric and Local 1439. Under the CBA, when a vacancy occurs within a particular promotional series, it is first offered to members at the next highest level of the promotional series on the basis of their "promotional series seniority." If no one at that level is interested, the position is similarly offered to members at the next highest level, and so on.[2] If no employee within the relevant promotional series is qualified or interested, the vacancy is placed on a bid list, copies of which are posted for five working days on bulletin boards accessible to all employees covered by the CBA. The position is then filled by the bidder with the most seniority, provided that he or she has the ability and qualifications to do the job.

C. Boersig Denied Promotion to Meter Installer Because of Disability

Sometime during the first half of 1994, Boersig expressed interest in promotion to the position of Meter Installer (Installer). In May 1994, when an Installer position became available, Boersig was wearing a leg brace and had just returned from wrist surgery. Richard Guenther, the superintendent of the Meter Department at that time, knew Boersig was interested, but also

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[2] For example, if a Meter Repairman position becomes available, the CBA requires that it be offered to all Meter Installers on the basis of their promotional series seniority before it is offered to any Helper.

knew about Boersig's injuries and was concerned that Boersig would not be able to handle the physical requirements of the Installer job.[3] In late June or early July 1994, Boersig asked Ed LaFaver, Meter Shop supervisor, to permit him to "go outside" and observe or try the Installer job so that he could determine whether he could do it despite his physical limitations. Boersig suggested to LaFaver that he could perform the Installer job by climbing ladders "one-legged." LaFaver told plaintiff that he did not want to train someone who would be unable to perform the job.

Union Electric asked Dr. Bryan Rogers to review the Installer Job Description and consult with Boersig's physicians to determine whether Boersig could safely perform the Installer position. Based on Dr. Roger's report, the restrictions from Boersig's physicians, and the observations of Boersig's supervisors, Union Electric determined that Boersig could not safely perform

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[3] The Meter Installer job involves installing, repairing, and removing residential and commercial electric meters. An Installer generally works alone, driving between job sites in a company van containing the Installer's tools and a fiberglass ladder. The fiberglass ladder currently used by Union Electric's Installers is nineteen feet long and weighs forty-eight pounds. The ladder can be broken down into two sections.

Meter Installers are required to reconnect service at service outlets. Although the meter is usually at eye level, the service outlet to which the meter is connected can be up to eighteen feet off the ground. In situations such as these, the Installer must transport his ladder from his van to the location of the service outlet, set up the ladder, and then ascend it to gain access to the outlet itself. Once up the ladder, the Installer "makes up" the outlet by installing wire into a "split bolt connector" and then covers and tapes the connector. Service is usually energized at 240 volts while the Installer is working.

the Installer job. On July 25, 1994, after consulting with Boersig and Boersig's physicians, Guenther sent plaintiff a letter that stated:

> On July 11, 1994, we met in Ed LaFaver's office to inform you of our determination as to your fitness for promotion to fill a vacancy in the position of Electric Meter Installer, Grade II. It was our determination that your physical limitations would prevent you from safely and effectively performing these job duties. Therefore, promotion was denied.

From that time on, Union Electric filled vacancies that occurred in its Installer positions with Helpers who had less seniority than plaintiff. Boersig never filed a grievance with Local 1439 or a charge with the Equal Employment Opportunity Commission (EEOC) or the Missouri Commission on Human Rights (MCHR). When future Installer positions became available, Boersig failed to request any reasonable accommodations to allow him to successfully perform the job.

D. Boersig Denied Promotion to Meter Repairman Because of CBA's Seniority Provision

In 1996, a Meter Repairman position became available. In accordance with the CBA, Union Electric offered it to employees then working on the same promotional level series. Gina Perry, who had been promoted to an Installer position in February 1995 (after plaintiff would have been promoted but for the alleged discrimination), sought and received the Repairman job.

On December 10, 1996, Boersig submitted a grievance report to Local 1439. Boersig wrote, "The company has denied promotion. This action has resulted in employees with less dept[artmental] seniority to advance

in the promotional series. The denial of promotion dates to July 1994." Plaintiff requested as a remedy "promotion to Repairman status."

On December 20, 1996, Boersig filed another charge of discrimination with the EEOC. In the charge, plaintiff alleged that he had "been denied consideration for promotion to both Meter Installer and to Meter Repairman." Plaintiff explained, "On Monday, November 25, 1996, Gina Perry was to begin as Meter Repairman, having passed me over for promotion." Plaintiff described the discrimination as continual since April 5, 1996.

On October 7, 1997, Boersig commenced the instant action against defendants Union Electric and Local 1439, alleging unlawful denial of promotion to Repairman and Installer. The district court granted defendants' motions for summary judgment on both claims. This appeal followed.

II. ANALYSIS

A. Repairman Position

1. Reasonable Accommodation

The ADA prohibits an employer from discriminating against a qualified individual with a disability by failing to make "reasonable accommodations to the known physical or mental limitations" of that individual. 42 U.S.C. § 12112(b)(5)(A). The issue before us is whether this provision requires an employer to provide an accommodation to a disabled employee that would directly violate the promotional series seniority system maintained by an employer and a union under the terms of a CBA. We hold that it does not.

Boersig first argues that Union Electric should have accommodated him by promoting him instead of Gina Perry to the Repairman position in November 1996. At the time the Repairman position became available, Boersig was a Helper and Perry worked as an Installer. Boersig acknowledges that the CBA required Union Electric to give hiring preferences to Installers over Helpers when filling vacant Repairman positions. However, Boersig argues that he should have been awarded the Installer position in 1994 or 1995. If he had been promoted at that time, Boersig would have had more promotional series seniority than Perry when Union Electric filled the Repairman position.

Insofar as Boersig's argument relies on Union Electric's alleged failure to promote him to Installer in 1994 and 1995, his argument fails. In granting summary judgment in favor of the defendants, the district court concluded that Boersig's reasonable accommodation claim was time-barred because Boersig filed his EEOC complaint more than 300 days after the effective date of Union Electric's unlawful actions. *See* 42 U.S.C. § 2000e-5(e)(1) (applicable to ADA claims under 42 U.S.C. §12117(a)). We agree with the district court. Boersig cannot now resurrect his time-barred claims by challenging Union Electric's adherence to the promotional system clearly set forth in the CBA.

Boersig also argues that Union Electric should accommodate his disability by simply promoting him directly from Helper to Repairman. Boersig argues that he is fully capable of performing all Repairman duties in a safe and effective manner, and, thus, Union Electric should promote him to

Repairman ahead of Installers who would otherwise be entitled to the position under the CBA's promotional system. In light of unambiguous Eighth Circuit precedent, we reject Boersig's arguments.

In *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995), we held that the ADA does not require an employer to accommodate a disabled employee by violating a "bona fide" seniority system. A "bona fide" seniority system has been defined as "one that was created for legitimate purposes, rather than for the purpose of discrimination." *Eckles v. Consolidated Rail*, 94 F.3d 1041, 1046 n.7 (7th Cir. 1996). Boersig offers no evidence that Union Electric and Local 1439 incorporated the promotion system at issue in this case to discriminate against the disabled. Thus, Boersig has failed to demonstrate that the promotion system is not "bona fide." Moreover, although the CBA's promotional system is based on departmental seniority rather than total length of employment, we find that this CBA creates a seniority system which Union Electric was not required to violate to accommodate Boersig's disability. *See Benson*, 62 F.3d at 1114.

2. Disparate Impact

Boersig attempts to avoid the rule announced in *Benson*, a reasonable accommodation case, by invoking a disparate impact theory of ADA liability, which defines discrimination as including the use of "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless such criteria are "shown to be job-related for the position in

question and [are] consistent with business necessity." 42 U.S.C. § 12112(b)(6). Boersig argues that, because employees with his disability are unable to perform the duties of an Installer, the CBA's requirement that Union Electric offer vacant Repairman positions to Installers before Helpers is a selection criterion that is "unlawful as applied to him" because it has "the effect of discriminating against him because of his disability without any sound business justification." We reject Boersig's argument.

Although the term "selection criteria" is used in both Title VII and the ADA, Boersig has cited no cases to this Court supporting his argument that a bona fide seniority system fits within the definition of "selection criteria." Boersig has not convinced us that seniority systems should be considered "selection criteria" for purposes of 42 U.S.C. § 12112(b)(6). Including seniority systems within the definition of "selection criteria" would jeopardize many carefully negotiated CBAs because virtually all seniority systems contain prerequisites for movement between jobs. Many of these prerequisites "screen out" disabled employees from certain jobs within the seniority system. Unless an employer renegotiates this kind of seniority system with the union to allow certain accommodations for disabled employees, Boersig's "disparate impact" argument would require an employer to accommodate a disabled employee by violating the express terms of a CBA. However, we have repeatedly held that the ADA does not require an employer to "take action inconsistent with the contractual rights of other workers under a collective bargaining agreement." *See, e.g.,*

Benson , 62 F.3d at 1114. For similar reasons, the ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability.

Seniority systems contained in CBAs, such as the one involved in the instant case, create rights in union members which are protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187. Our *Benson* decision recognizes the importance of protecting these rights from unnecessary interference arising from the perceived need to accommodate a disabled employee under the ADA. We believe that these rights are entitled to protection regardless of whether a plaintiff seeks a reasonable accommodation or claims the seniority system has a disparate impact on disabled employees. In either case, the plaintiff invites the court to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. This sort of judicial intrusion into labor relations is unwarranted unless an employee can show that a seniority system was designed to discriminate against the disabled. Because we find the promotional system in the instant case is a bona fide seniority system, we reject Boersig's disparate impact claim.

B. Installer Position

Boersig also argues that Union Electric unlawfully failed to promote him when Installer positions became available in 1996 and 1997. The district court granted

summary judgment against Boersig, finding that Boersig failed to propose or request reasonable accommodation in order to perform the Installer positions. After a review of the record and the parties' briefs, we affirm. *See* 8th Cir. R. 47B.

III. CONCLUSION

In sum, we affirm the district court's rulings in their entirety.[4]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[4] After careful consideration of the record and the parties' briefs, we reject all other arguments Boersig raises in this appeal without further comment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2699EMSL

Randall Boersig,
Appellant,

vs.

Union Electric Company, International Brotherhood of Electrical Workers, Local 1439,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This order is filed to amend previous order of 8/17/00 by adding "Judge Morris S. Arnold took no part in the denial of the rehearing petition".

CORRECTED ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Morris S. Arnold took no part in the denial of the rehearing petition.

August 22, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Michael E. Gans
Clerk,
U.S. Court of Appeals,
Eighth Circuit

(2)

Supreme Court, U.S.
FILED

DEC 15 2000

OFFICE OF THE CLERK

No. 00-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

RANDALL BOERSIG,
Petitioner,

v.

UNION ELECTRIC COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1439,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that Union Electric Company's promotional series seniority system, established as part of a carefully negotiated collective bargaining agreement between union and employer, was a bona fide seniority system under *California Brewers Association v. Bryant*?

2. Did the Court of Appeals correctly conclude that the ADA does not require an employer to violate a bona fide seniority system, established by a legitimate, carefully negotiated collective bargaining agreement, in order to give preferential treatment to an employee claiming a disability, where there is no showing that the seniority system was designed to discriminate against the disabled?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Union Electric Company advises the Court that the parent company of Union Electric Company (now d/b/a AmerenUE) is Ameren Corporation. No publicly held company owns 10% or more of Ameren Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RESPONDENT'S BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
CONCLUSION	17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aldrich v. Boeing Co., 146 F.3d 1265 (10*th* Cir. 1998), *cert. denied*, 119 S. Ct. 2018 (1999) 9

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) 10

Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995) 9

Boersig v. Union Electric Company, 219 F.3d 816 (8th Cir. 2000) 1,5,8,12-16

California Brewers Association v. Bryant, 444 U.S. 598 (1980) i,5-8,12

Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998) 9

Craig v. Alabama State University, 804 F.2d 682 (11th Cir. 1986) 11

Davis v. Florida Power & Light Company, 205 F.3d 1301 (11*th* Cir.), *cert. denied*, 121 S. Ct. 304 (2000) 9,15

Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997) 8,10,14,15

Feliciano v. State of Rhode Island, 160 F.3d 780 (1st Cir. 1998) 9

Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) 9

Franks v. Bowman Transport Co., 424 U.S 747 (1976) 15

Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997) 9,13

Malabarba v. Chicago Tribune Co., 149 F.3d 690 (7*th* Cir. 1998) 15

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 12

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 15

Willis v. Pacific Maritime Association, 162 F.3d 561 (9*th* Cir. 1998) 9

FEDERAL STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 10

Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 ..... passim

National Labor Relations Act, 29 U.S.C. § 158 *et seq.* 12,13

Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* *14*

Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e *et seq.* *6,7,10,12*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Union Electric Company respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. That opinion is reported at 219 F.3d 816.

STATEMENT OF THE CASE

Petitioner Randall Boersig, an employee of Union Electric Company (UE), filed the present action alleging that he had been discriminated against in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. Boersig has been employed at UE since 1986, and has worked in the Meter Testing and Installation Department (Meter Department) of UE as a Meter and Installation Helper (Helper) since 1989. He is a member of the International Brotherhood of Electrical Workers, Local 1439 (Union), and is subject to the terms and conditions of the collective bargaining agreement (CBA) between UE and the Union. The seniority provision of the CBA sets forth the seniority and promotion rights of Boersig and other bargaining unit members.

Under the CBA, Boersig is within a promotional series known as the "Meter Testing and Installation Seniority Division Promotional Series." The positions within that promotional series include the entry-level Helper position, and the higher level positions of Meter Installer, Meter Repairman, Power Meterman and Meter Standards Tester. Under the terms of the seniority provision of the CBA, when a vacancy occurs within a particular promotional series, it is offered first to members at the same or next highest level of the promotional

series on the basis of their promotional series seniority. If no one at the same or next highest level is interested or eligible, the position is then offered to employees at the next highest level, and so on. For example, when a Repairman position becomes available, the CBA requires that it be offered first to Installers in order of their promotional series seniority before it is offered to any Helpers. If no employee within the relevant promotional series is qualified or interested, the vacancy is placed on a bid list and is posted for five working days. The position is then filled by the bidder with the most seniority, provided he or she has the qualifications and ability to do the job.

Since the mid-80's, Boersig has been involved in a series of automobile accidents and work-related injuries, resulting in multiple surgeries and physical impairments affecting both his knees, both his wrists, his left hand, left shoulder and right hip. As a result, Boersig has permanent medical restrictions prohibiting him from kneeling, squatting and lifting over twenty-five pounds. In addition to these restrictions labeled "permanent," the record shows a long history of other limitations and restrictions claimed by Boersig, including difficulty climbing ladders and stairs and handling tools. UE provides various accommodations to Boersig to assist him in performing the Helper job functions, including, among other things, reassigning to his co-workers tasks involving heavy lifting.

Between 1994 and 1997, several Meter Installer positions became available. The Installer position is considerably more physically demanding than the Helper position. In view of Boersig's physical limitations, UE did not place him in one of these positions because it did

not believe he could perform the Installer job safely and effectively. Boersig's challenge in this lawsuit to UE's failure to promote him to any of these Installer positions was rejected by the District Court and the Eighth Circuit on the grounds that his claims were either time-barred or, insofar as they were not untimely, Boersig had failed to propose or request reasonable accommodations that would enable him to perform the essential functions of the Installer position. Boersig is not challenging this portion of the Eighth Circuit's decision.

In 1996, a Meter Repairman position became available. In accordance with the CBA, UE offered the position first to employees then working on the same promotional series level. The position was offered to and accepted by Gina Perry, who was at the time an Installer. No other Repairman openings have occurred since that time.

Boersig did not dispute that Gina Perry's promotion to Repairman was made in accordance with the CBA. He nevertheless claimed that UE and the Union should have agreed to disregard the terms of the CBA and allow him to promote directly from Helper to Repairman.[1] Boersig argued that this would be a reasonable accommodation for his "disability."[2] Alternatively, he argued

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[1] The Union has stated that it would not allow Boersig to be promoted to Repairman ahead of other individuals in the Meter Department with more promotional series seniority.

[2] The issue of whether Boersig is, in fact, "disabled" within the meaning of the ADA was disputed by UE. That issue was not decided by the trial court, which merely assumed disability for purposes of considering defendants' motions for summary judgment.

that he was invoking a disparate impact theory of liability under the ADA. According to Boersig, because individuals with his physical limitations are unable to perform the duties of the Installer position, the requirement under the CBA that a vacant Repairman position be offered to Installers before it is offered to Helpers is a "selection criterion" that is unlawful as applied to him, because it has the effect of discriminating against him without any sound business justification.

The District Court rejected these arguments, and granted summary judgment in favor of UE and the Union on all of Boersig's claims. The Eighth Circuit affirmed the judgment of the District Court in its entirety. The appellate court held that the CBA's promotional system was a bona fide seniority system, which, under clear Eighth Circuit precedent, UE was not required to violate to accommodate Boersig.

The Eighth Circuit also found unpersuasive Boersig's efforts to avoid this rule by invoking a disparate impact theory of ADA liability. The Court noted that Boersig had neither cited any authority supporting his argument that a bona fide seniority system fits within the definition of "selection criteria," nor had he otherwise convinced the Court that seniority systems should be considered "selection criteria" within the meaning of the disparate impact provision of the ADA, 42 U.S.C. § 12112(b)(6).[3] To the contrary, the Court noted the strong policy reasons that counsel against disrupting a

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[3] Section 12112(b)(6) states that employers cannot use "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless such criteria are "shown to be job-related for the position in question and [are] consistent with business necessity."

carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. Such judicial intrusion, the Eighth Circuit pointed out, is particularly unwarranted where, as here, there is absolutely no evidence – and Boersig has never claimed — that the seniority system was incorporated into the CBA for any improper or discriminatory purpose. *Boersig v. Union Electric Company*, 219 F.3d 816, 822-23 (8th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Holding That UE's Promotional System is a Bona Fide Seniority System is Entirely Consistent with *California Brewers.*

Boersig argues that the Eighth Circuit's holding that the CBA's promotional system is a bona fide seniority system "clashes" with this Court's decision in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980). This argument is based on a fundamental misreading of the holding in *California Brewers*.

In an effort to manufacture a conflict with *California Brewers,* Boersig attempts to bifurcate the language of the seniority provision in question. He suggests that there are two separate considerations in the CBA for promotion to Repairman: first, that Installers must be offered the job ahead of Helpers, and second, that the position must be offered to employees in order of their length of service within the seniority division. He contends that only the second consideration "may be" a seniority rule, whereas the first consideration – giving preference to Installers over Helpers – "has nothing to

do with length of service and cannot be characterized as a seniority rule."[4]

California Brewers does not, however, support the unduly narrow construction plaintiff asserts. To the contrary, the CBA provision at issue here falls comfortably within the reasoning in *California Brewers*.

In discussing the exemption for seniority systems under Title VII, 42 U.S.C. § 2000e – 2(h), this Court explained in *California Brewers* that a "seniority system" is a scheme that may involve seniority and non-seniority criteria, and that the exemption for seniority systems under Title VII "quite evidently" includes

> more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.

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[4] Boersig maintains that he can "hardly be said to be challenging a seniority rule" because he had the most seniority of anyone who expressed an interest in the Repairman position that became available in 1996. He emphasizes that he "outranked" Gina Perry, the person who was promoted to the position in accordance with the term of the CBA, by some 60 months of divisional seniority. Mr. Boersig conveniently "picks and chooses" those aspects of seniority he finds beneficial to his position. If what he characterizes as "true" seniority were the only determinative factor, Gina Perry would still be entitled to the Repairman position, because the record shows that she has more length of service with UE than Boersig. If Boersig's claim that the preference given to Installers when filling Repairman positions is not part of a seniority system, then neither is the preference he seeks based on the length of his service in the Meter Division as a Helper.

Id. at 607. The Court noted that Title VII was passed against the backdrop of the long-standing national labor policy of allowing freedom to establish conditions of employment through the collective bargaining process, and that seniority systems, "reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes." *Id.* at 608.

Although Boersig attempts to equate the promotional series seniority system at issue here with hiring preferences based on such personal characteristics as height, strength and education, that comparison simply does not hold water. The fact that the seniority provision in question combines job classification with length of service in determining promotions does not depart from commonly accepted concepts of seniority. It is, in fact, quite similar to examples of valid seniority systems this Court offered in *California Brewers.* The Court recognized, for example, that every seniority system must include rules delineating when and how seniority begins accruing. Thus, a collective bargaining agreement could specify that an employee begins to accumulate seniority rights at the time he begins employment with the company, at the time he begins employment within the industry, at the time he begins performing a particular job function, or only after a probationary period of employment. *Id.* at 607 n. 17. Similarly, the Court recognized that seniority systems must also have rules that define "which passage of time will 'count' towards accrual of seniority and which will not." *Id.* at 607.

Under Boersig's analysis, any seniority provisions based in part on time spent in a particular job classification would not be considered a bona fide seniority

system. This argument has no support in *California Brewers*. To the contrary, the Court specifically noted in that case that "the time an employee works in a particular job classification might determine his seniority." *Id.* at 607 n. 19. The Eighth Circuit's holding that the promotional system in the CBA is a bona fide seniority system,[5] even though it is not based merely on total length of employment, is entirely consistent with *California Brewers*.

II. The ADA Does Not Require UE To Violate A Bona Fide Seniority Provision In A Collective Bargaining Agreement Under Either A Reasonable Accommodation Or A Disparate Impact Analysis

Alternatively, Boersig maintains that, under a disparate impact analysis, the ADA required UE to promote him to Repairman ahead of Installers who would be entitled to the position under the CBA, notwithstanding the existence of a bona fide seniority system. He cites no cases that support this argument.

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[5] A seniority system is "bona fide" where it was "'created for legitimate purposes, rather than for the purpose of discrimination.'" *Boersig v. Union Electric Company*, 219 F.3d 816, 821-22 (8th Cir. 2000) (quoting *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041,1046 n. 7 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997)). Boersig has neither suggested nor shown that the seniority system challenged in the present case was adopted by UE and the Union for improper or discriminatory purposes. Thus, while it is true that an employer cannot use a collective bargaining agreement to accomplish what it would be prohibited from doing under the ADA, Boersig has not claimed, nor is there any evidence, that the seniority provision at issue was created or administered, even in part, to avoid any obligations under the ADA.

Moreover, in making this argument, Boersig largely ignores the substantial precedent in both the Eighth and other circuits, holding that the ADA does not require an employer to accommodate a disabled employee by violating a bona fide seniority system. *See, e.g., Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). *See also Davis v. Florida Power & Light Company,* 205 F.3d 1301, 1307 (11th Cir.) (the ADA does not require accommodations that contravene the seniority rights of other employees under a collective bargaining agreement), *cert. denied,* 121 S.Ct. 304 (2000); *Willis v. Pacific Maritime Association*, 162 F.3d 561, 565-566 (9th Cir. 1998) (an employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a collective bargaining agreement); *Feliciano v. State of Rhode Island,* 160 F.3d 780, 787 (1st Cir. 1998) (the ADA does not require an employer to violate the provisions of a collective bargaining agreement or violate the rights of other employees under the agreement in making accommodations); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1272 n. 5 (10th Cir. 1998) (plaintiff's proposed transfer which would violate the seniority provisions of a collective bargaining agreement is not required by the ADA), *cert. denied*, 119 S.Ct. 2018 (1999); *Cassidy v. Detroit Edison Co.,* 138 F.3d 629, 634 (6th Cir. 1998) (reassignment as an accommodation under the ADA does not require violating another employee's rights under a collective bargaining agreement); *Kralik v. Durbin*, 130 F.3d 76, 81, 83 (3d Cir. 1997) ("an accommodation to one employee that violates the seniority rights of other employees in a collective bargaining agreement is simply not reasonable"); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) (the ADA does not require an employer to make an accommodation that would be

inconsistent with the rights granted to other employees under a collective bargaining agreement), *cert. denied*, 522 U.S. 1115(1998); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051(7th Cir. 1996) ("the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees"), *cert. denied*, 520 U.S. 1146 (1997). *But cf. Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (rejecting a per se rule barring reassignment as a reasonable accommodation when it would conflict with a seniority system in the context of a seniority system not grounded in a collective bargaining agreement).

Boersig essentially dismisses this clear line of precedent on the ground that these cases were "reasonable accommodation" cases, whereas he is invoking a disparate impact theory of liability.[6] But the fundamental policy considerations underlying these cases apply with equal force in both contexts. As the Seventh Circuit explained in *Eckles*, the issue is "whether the rights granted under the ADA itself extend so far as to trump otherwise legitimate, collectively bargained seniority rights." 94 F.3d at 1045. The answer is no, regardless of whether a plaintiff describes his claim as a "reasonable accommodation" claim or as a "disparate impact" claim.

Boersig seeks to avoid this result by emphasizing that the ADA, unlike Title VII and the ADEA, has no language exempting seniority systems from claims of dis-

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[6] Boersig has apparently abandoned the reasonable accommodation claim he pursued in the District Court and in the Eighth Circuit.

crimination. He submits that the seniority provision that requires UE to offer vacant Repairman positions to Installers before they are offered to Helpers is a "selection criterion" which is unlawful as applied to him, because, without any sound business justification, it tends to screen him out from successfully obtaining a Repairman position, in violation of 42 U.S.C. § 12112(b)(6) of the ADA.

Again, Boersig cites no case law in support of his argument that any bona fide seniority system should be considered a "selection criterion" for purposes of Section 12112(b)(6). He merely insists that "anything an employer uses to select an employee for a job or other employment benefit" must be considered as "selection criteria." Similarly, Boersig has cited no case in which an employer has been required under the ADA to waive a legitimate, collectively-bargained seniority provision, neutral on its face, on the ground that it has a "disparate impact" on a particular disabled employee.[7] There are, however, strong policy considerations that weigh against any such unduly sweeping interpretation.

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[7] Boersig's reliance on *Craig v. Alabama State University,* 804 F.2d 682 (11th Cir. 1986), is misplaced. *Craig* involved a reverse discrimination claim based on a University policy of granting hiring preferences to current employees on work study programs. The plaintiff, a white female, asserted a disparate impact claim against the backdrop – and as a continuation – of prior proceedings in which the University was held to have engaged in a pattern and practice of discrimination against whites, and had been enjoined from engaging in further discriminatory hiring practices. The present case arises against no similar backdrop of established discrimination. Furthermore, *Craig* did not involve a bona fide seniority system within a carefully negotiated collective bargaining agreement, as the present case does.

Continued on Next Page

The approach argued for by Boersig invites enormous disruption to "this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers,* 444 U.S. at 608 (citing *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979)). His approach would, in the context of collective bargaining agreements, subject an employer to the Hobson's choice of violating either the ADA or the National Labor Relations Act, or at least subjecting itself to the threat of litigation under these statutes, any time a legitimate seniority provision was claimed to have an adverse impact on a single disabled employee. Requiring an employer to violate seniority rights would not only subject the employer to the cost of defending itself

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Footnote 7 Continued

Boersig also argues that the Eighth Circuit's decision "makes sense only if Congress meant to exempt all selection criteria in collective bargaining agreements from disparate impact analysis under Title VII and the ADA." This misguided argument is based on a significant misreading of the Eighth Circuit's decision. The Eighth Circuit merely rejected Boersig's unsupported argument that a bona fide seniority system in a collective bargaining agreement should be considered a "selection criterion" within the meaning of the ADA. The Eighth Circuit did not hold in *Boersig* that any term in a collective bargaining agreement would necessarily be immune from disparate impact analysis. Rather, the Court correctly held that where, as here, there is absolutely no evidence that a seniority system was designed to discriminate against the disabled, the ADA does not require that the rights of other employees under the agreement be disrupted, whether the relief sought is denominated as a request for reasonable accommodation or a claim of disparate impact.

against grievances and the risk that it might be subject to a costly remedy, but would impose an unfair burden on the disabled employee's co-workers, who would lose the benefit of their seniority status. *See Kralik*, 130 F.3d at 83 and n. 8.

Boersig insists that such intrusions would be rare but, in fact, the possibility exists under every seniority system that a particular disabled employee may be screened out from a job because of job classification prerequisites established through collective bargaining. That does not mean a bona fide seniority system is a discriminatory "selection criterion." As the Eighth Circuit stated,

> Including seniority systems within the definition of "selection criteria" would jeopardize many carefully negotiated CBAs because virtually all seniority systems contain prerequisites for movement between jobs. . . . Boersig's disparate impact argument would require an employer to accommodate a disabled employee by violating the express terms of a CBA. However, we have repeatedly held that the ADA does not require an employer to "take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.". . . . [T]he ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability.

219 F.3d at 822 (citation omitted).

Seniority systems in collective bargaining agreements create rights in union members, which are protected by the National Labor Relations Act. These rights are

entitled to protection from unnecessary interference, regardless of whether a plaintiff asserting rights under the ADA presents his claim as one for reasonable accommodation, or as a claim that the seniority system in question has a disparate impact on him because he is disabled. Either way, the plaintiff is asking the court "to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who had legitimate expectations of advancement based on the governing CBA." *Boersig*, 219 F.3d at 822. As the Eighth Circuit indicated, such judicial intrusion into labor relations might be warranted if an employee could show that the seniority system was designed to discriminate against the disabled. But where, as in the present case, there is absolutely no evidence or suggestion that the seniority system was adopted for any improper or discriminatory purpose, no such judicial intrusion is justified. *Id.*

This reasoning is not altered by the fact that the ADA contains no express language exempting seniority systems. As the Seventh Circuit explained in *Eckles*, the Rehabilitation Act also contains no such exemption, yet courts have unanimously concluded that the Rehabilitation Act does not require infringing on seniority rights. 94 F.3d at 1047-49 and n. 13. There is similarly no reason to conclude that the absence of express protection of seniority rights in the ADA is determinative. "Congress drafted the ADA against the backdrop of well-established precedent that 'reasonable accommodation' under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees." *Id.* at 1048.

This Court has long recognized the special status and importance of bona fide seniority systems. *See, e.g.*,

Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). At the core of long-standing and well-established national labor relations policy is the emphasis on the importance of collective bargaining "aimed at effecting workable and enforceable agreements between management and labor." *Hardison*, 432 U.S. at 79. "[C]ollectively bargained seniority rights have a pre-existing special status in the law and . . . Congress to date has shown no intent to alter this status by the duties created under the ADA." *Eckles*, 94 F.3d at 1052. *See also Davis*, 205 F.3d at 1307. *Cf. Hardison*, 432 U.S. at 79 ("without a clear and express indication from Congress, we cannot agree...that an agreed-upon seniority system must give way when necessary to accommodate religious observances").

Relying on his unsupported insistence that a bona fide seniority system is a "selection criterion," Boersig broadly asserts that, where disabled employees are concerned, "Congress has struck the balance of competing interests in favor of the employee - *not* the employer or other non-disabled employees." That is not the case. Congress enacted the ADA to eliminate discrimination and establish a "level playing field" for disabled workers; "it did not do so in the name of discriminating against persons free from disability." *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998). In the guise of a disparate impact analysis, what Boersig actually seeks is not a level playing field, free from improper discrimination, but the kind of preferential treatment to which the ADA does not entitle him.

Ultimately, Boersig offers no rationale for disregarding the rights of other employees under a collective bargaining agreement simply because a plaintiff de-

scribes his claim as a "disparate impact" claim rather than a "reasonable accommodation" claim. To the contrary, Boersig's claim here that the seniority provision of the collective bargaining agreement should be ignored because it may affect his chances of becoming a Repairman is of the very same fabric as a claim for an accommodation in violation of a bona fide seniority provision. If, as the many appellate courts cited above make clear, accommodations in violation of bona fide seniority provision in a collective bargaining agreement are unreasonable and not required, then it would be wholly inconsistent and irrational to hold that, absent proof of independent business justification, those same bona fide provisions may, under the same facts, violate the ADA under a disparate impact analysis.

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari filed by Randall Boersig should be denied

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